

Pursuant to Ind.Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

JUDY M. TYRRELL
Tabbert Hahn Earnest & Weddle
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVEN MICHAEL LUTZ
J. DAVID HOLLINGSWORTH
Hollingsworth & Lutz
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

KAREN FIELDER,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 29A02-0610-CV-848
)	
LAURA BUCKNER,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0503-PL-274

July 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Karen Fielder appeals from the trial court's judgment in favor of Laura Buckner on Buckner's complaint alleging malicious prosecution. Fielder presents two issues for our review:

1. Whether the trial court erred when it found in favor of Buckner on her malicious prosecution claim.
2. Whether the trial court erred when it awarded Buckner punitive damages.

Buckner cross-appeals and requests appellate attorney's fees and costs.

We affirm.

FACTS AND PROCEDURAL HISTORY

Fielder and Buckner live in the same neighborhood and have had a tumultuous relationship since approximately 2001. In August 2004, another neighbor witnessed Fielder take mail out of Buckner's mailbox. Also that month, Fielder impersonated Buckner and arranged to have several of Buckner's utilities shut off without her knowledge or consent. The State filed ten counts of Class D felony Identity Deception against Fielder, and she ultimately pleaded guilty to one of those counts in exchange for the dismissal of the remaining counts.

In the meantime, Fielder petitioned for an order of protection against Buckner, alleging that Buckner was stalking Fielder and describing three incidents that occurred in July 2004. In particular, Fielder alleged that Buckner "uses profanity towards me & my kids" and "ask[ed] the lifeguard [at the community pool] to find a reason to have me thrown out[.]" Appellant's App. at 10. Fielder also alleged that Buckner "teaches her

children to throw rocks on me [sic] & my children. She followed us to our home & harassed us to not go back.” Id.

A hearing on that petition was held on February 11, 2005. Fielder was represented by counsel, but she did not attend the hearing due to alleged complications with her pregnancy at that time. At the outset of the hearing, Fielder’s counsel requested a continuance, which was denied, and he then moved for permission to withdraw his and his firm’s representation of Fielder. Her counsel stated that Fielder had failed to communicate with anyone at his firm. The trial court granted counsel’s motion to withdraw. Thereafter, Buckner moved for dismissal of Fielder’s petition for an order of protection with prejudice, which the trial court granted.

On March 21, 2005, Buckner filed a complaint against Fielder alleging libel and malicious prosecution. Following a bench trial, the trial court found in favor of Fielder on the libel claim, but found in favor of Buckner on the malicious prosecution claim. In addition, the trial court awarded Buckner \$7,601.75 in attorney’s fees and \$5,000 in punitive damages, for a total award of \$12,601.75. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

In reviewing a general judgment issued following a civil bench trial, we must affirm if there is substantial evidence of probative value supporting the judgment on any legal theory. Hodges v. Swafford, 863 N.E.2d 881, 885 (Ind. Ct. App. 2007). We neither reweigh evidence nor judge the credibility of witnesses, and we consider only the

evidence most favorable to the prevailing party along with all reasonable inferences to be drawn therefrom. Id.

Issue One: Malicious Prosecution

Fielder first contends that the evidence is insufficient to support the trial court's conclusion that she had committed the tort of malicious prosecution. The elements of a malicious prosecution claim are: (1) the defendant instituted or caused to be instituted an action against the plaintiff; (2) the defendant acted with malice in doing so; (3) the defendant had no probable cause to institute the action; and, (4) the original action was terminated in the plaintiff's favor. Trotter v. Ind. Waste Sys., 632 N.E.2d 1159, 1164 (Ind. Ct. App. 1994). Fielder concedes that the first element of a malicious prosecution claim was satisfied when she petitioned for an order of protection against Buckner. But Fielder challenges the evidence supporting the remaining three elements. We address each in turn.

Malice and Probable Cause

Fielder contends that the evidence is insufficient to show that she acted with malice and was without probable cause when she petitioned for an order of protection against Buckner. Malice may be inferred from a lack of probable cause. Satz v. Koplow, 397 N.E.2d 1082, 1085 (Ind. Ct. App. 1979). Probable cause for the filing of a suit exists if, upon reasonable inquiry, a reasonable, intelligent, and prudent person would be induced to bring the action. Trotter, 632 N.E.2d at 1164. Further, although "personal hatred or revenge" is not necessary to prove malice, we have found no authority which

prohibits the consideration of personal animosity in establishing malice. Satz, 397 N.E.2d at 1085.

Here, Fielder's contentions on appeal amount to a request that we reweigh the evidence, which we will not do. The evidence shows a history of malicious acts by Fielder against Buckner, not the least of which was Fielder's theft of Buckner's identity. And Buckner presented evidence refuting the allegations of Buckner's bad acts in Fielder's petition for order of protection. Thus, the evidence supports a determination that Fielder did not have probable cause to institute the order of protection petition against Buckner. And, therefore, it follows that the evidence supports a determination that Fielder acted with malice when she filed the petition. See id.

Action Terminated in Buckner's Favor

Fielder also contends that the fourth element of a malicious prosecution claim is not satisfied in this case. In particular, she maintains that "[b]ecause no hearing was held on the merits [of the petition for order of protection], this was not a termination in favor of either party." Brief of Appellant at 11. We cannot agree.

Indiana Rule of Trial Procedure 41(B) provides in relevant part that unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision or subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits. Trial Rule 41(E) pertains to dismissals for failure to prosecute or failure to comply with the trial rules.

Here, it is undisputed that the trial court did not dismiss Fielder's petition for order of protection for lack of jurisdiction. And while the trial court's order dismissing that petition does not expressly state the basis for dismissal, it was done either pursuant to Trial Rule 41(E), failure to prosecute or comply with trial rules, or the "any dismissal not provided for in this rule" provision of Trial Rule 41(B). Further, the trial court dismissed the petition with prejudice. We hold that under Trial Rule 41(B), the trial court's dismissal of Fielder's petition constitutes an adjudication on the merits in favor of Buckner. As such, the fourth element of Buckner's malicious prosecution claim is satisfied. The trial court did not err when it found in favor of Buckner on that claim.

Issue Two: Punitive Damages

Fielder next contends that the trial court erred when it awarded Buckner punitive damages for malicious prosecution. Punitive damages are those designed to punish the wrongdoer and to discourage her and others from similar conduct in the future. America's Directories Inc. v. Stello One Hour Photo, Inc., 833 N.E.2d 1059, 1069 (Ind. Ct. App. 2005), trans. denied. They are awarded in addition to damages that compensate for the specific injury. Id. Therefore, the sole issue is whether the defendant's conduct was so obdurate that she should be punished for the benefit of the general public. Id.

The standard of review for determining whether punitive damages were properly awarded is whether, considering only the probative evidence and the reasonable inferences supporting the judgment, without weighing evidence or assessing witness credibility, a reasonable trier of fact could find by clear and convincing evidence that the

defendant acted with malice, fraud, gross negligence, or oppressiveness that was not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing. Id. Punitive damages may also be awarded upon a showing of willful and wanton misconduct. Id.

Fielder contends that Buckner is not entitled to punitive damages because the trial court did not first award her compensatory damages. In support of that contention, Fielder cites to Gomez v. Adams, 462 N.E.2d 212, 226 (Ind. Ct. App. 1984), where this court observed that “[i]t is elementary to the law of punitive damages that compensatory damages are a prerequisite for any award of punitive damages.” But this court has recognized that a party’s attorney’s fees incurred in defending an action underlying a malicious prosecution claim constitute compensatory damages. See Satz, 397 N.E.2d at 1087; See also Crosson v. Berry, 829 N.E.2d 184, 191 n.4 (Ind. Ct. App. 2005) (“In an action for malicious prosecution the plaintiff may recover . . . as compensatory damages the pecuniary loss which results directly from such prosecution[.]”), trans. denied. Here, the trial court awarded Buckner the amount she had expended in attorney’s fees to defend the protective order action against her as compensatory damages. Fielder’s contention on this issue must fail.¹

Cross-Appeal for Appellate Damages

Buckner contends that this appeal is frivolous and seeks an award of appellate damages, including appellate attorney’s fees. Appellate Rule 66(E) governs this issue

¹ Fielder also contends that there was not clear and convincing evidence that she had malice in filing her petition for order of protection. As such, Fielder maintains that a punitive damage award was not warranted. But as we discuss in Issue One, supra, the evidence supports the trial court’s implicit determination that Fielder acted with malice when she filed the petition. Fielder’s contention on this issue also fails.

and provides that this court may assess damages in favor of the appellee if an appeal is frivolous or in bad faith. We have discretion to award appellate attorney fees when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. Kuehl v. Hoyle, 746 N.E.2d 104, 110 (Ind. Ct. App. 2001). However, we must use extreme restraint when exercising this discretionary power to award damages on appeal because of the potential chilling effect upon the exercise of the right to appeal. Id. A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish lack of merit unless an appellant's contentions and arguments are utterly devoid of all plausibility. Id.

While we agree with Buckner that Fielder's argument with respect to the first issue amounts to a request that we reweigh the evidence, we cannot say that her appeal is utterly devoid of all plausibility. The second issue, in particular, presents a reasonable challenge to the punitive damage award. As such, we deny Buckner's request for appellate damages.

Affirmed.

RILEY, J., and BARNES, J., concur.